Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
*Petitioner,*

v.

DOSSEY DOUGLAS, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

## LIST OF PARTIES

Petitioner before this Court and appellee in the proceedings below is the California Department of Youth Authority.

Respondent before this Court and appellant in the proceedings below is Dossey Douglas.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
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DOSSEY DOUGLAS, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 14, 2001 and amended on November 26, 2001. *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9th Cir. 2001).

## OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals below is published at 271 F.3d 812 (9th Cir. 2001) and is reprinted in the Appendix at App. A-1 through App. A-21.

The Memorandum and Order of the United States District Court for the Eastern District of California (Shubb, Chief D.J.) and the corresponding Judgment, dated August 27, 1999, are reprinted at App. B-22 through App. B-37. The

transcript of the oral argument on August 23, 1999 before the United States District Court for the Eastern District of California (Shubb, Chief D.J.) is reprinted at App. C-38 though App. C-76.

## STATEMENT OF JURISDICTION

Respondent filed a complaint in the United States District Court for the Eastern District of California, citing federal jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367, 29 U.S.C. § 794 and 42 U.S.C. § 2000e-5. Petitioner's motion for summary judgment was thereafter granted and Judgment was entered on August 27, 1999. On appeal by Respondent, the Ninth Circuit reversed and remanded the case to the district court on November 14, 2001 (amended November 26, 2001).

On January 7, 2002, the Ninth Circuit *sua sponte* ordered the parties to file briefs by January 28, 2002, addressing the question whether the Ninth Circuit should rehear the case *en banc*. Both parties filed the requested briefs by the deadline of January 28, 2002. On February 4, 2002, the U.S. Supreme Court granted Petitioner an extension of time to file a petition for writ of certiorari to and including April 13, 2002. The Supreme Court's February 4, 2002 Order is reprinted at App. D-77. In a published decision, the Ninth Circuit denied rehearing *en banc* on April 12, 2002.

The jurisdiction of this Court to review the judgment of the Ninth Circuit rests on 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Respondent filed a complaint alleging disability discrimination under Title I of the Americans with Disabilities

Act, 42 U.S.C. § 12101, et seq. ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. ("Section 504").

The statutes at issue concern the limitations periods for filing claims under the ADA and Section 504. The limitations period for bringing ADA claims is imposed by Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), which reads, in pertinent part, as follows:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred ..., except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice ..., such charge shall be filed [with the EEOC] within three hundred days after the alleged unlawful employment practice occurred ....

Since there is no stated limitations period for bringing Section 504 claims, the limitations period for bringing such claims in California is borrowed from the California state statute of limitations for filing personal injury claims, California Code of Civil Procedure section 340(3), requiring an action to be filed:

> Within one year ... for injury to or for the death of one caused by the wrongful act or neglect of another ....

The substantive federal laws upon which the suit is based are Title I of the ADA and Section 504 of the

Rehabilitation Act of 1973. Title I of the ADA, 42 U.S.C. § 12112(a), reads, in pertinent part, as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [of this title], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

## STATEMENT OF THE CASE

Respondent Dossey Douglas completed an application in 1994 to participate in a written exam as the first step in the process to be hired as a "Group Supervisor" by Petitioner, the California Department of the Youth Authority ("CYA"). The Group Supervisor position is a peace officer classification within state civil service. Group Supervisors are responsible for the security and custody of youthful offenders within CYA correctional institutions. On March 1, 1996, CYA denied

employment to Respondent as a "Group Supervisor" and communicated its hiring decision, and the reason for it, to him in writing on that date. The express reason for the denial of employment was due to Respondent's inability to meet CYA's minimum color vision standards. Under CYA's hiring standards, evidence of a color vision deficiency (commonly referred to as "color blindness"), is a permissible basis upon which to reject an applicant for the Group Supervisor position. Group Supervisor applicants must demonstrate through post-employment-offer vision testing that they possess normal color vision or only a mild color vision deficiency to be eligible for appointment to the position.

Respondent sought reversal of CYA's hiring decision through the California State Personnel Board's ("SPB") appeals process and through CYA's internal discrimination complaint unit. These efforts failed to result in a reversal of CYA's hiring decision, and the SPB's decision denying Respondent's petition for rehearing before that body was issued on July 30, 1997.

On April 18, 1997, 413 days after Respondent was rejected for hire, he filed an EEOC charge of discrimination. In his EEOC charge, Respondent alleged:

> "I applied for a position as a Group Supervisor (Correctional Officer) in November 1994 and was rejected because of a disability. . . . "
> "I appealed the rejection. . . . "
> "I believe I have been discriminated against because of my disability."

On May 7, 1998, Respondent was issued a right-to-sue letter by the EEOC. On July 6, 1998, Respondent filed suit against CYA in the district court, alleging that he was

unlawfully denied employment in violation of the ADA and Section 504.

The district court granted summary judgment for CYA on the grounds that: (1) Respondent failed to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within the requisite 300-day limitations period following his rejection for hire on March 1, 1996, as a prerequisite to filing suit under the ADA and; (2) Respondent failed to file a Rehabilitation Act claim in federal court within the requisite one-year limitations period following his rejection for hire on March 1, 1996. The district court specifically rejected Respondent's continuing violation theory based on the continued existence of the hiring standard. It also rejected Respondent's arguments that the continuing violation doctrine was triggered when he re-submitted a written application for the Group Supervisor position in late 1996 or when he made inquiries about whether the standard was in effect in late 1998, because Respondent failed to demonstrate any application of CYA's color vision standard to him within the applicable limitations period. Respondent appealed the summary judgment against him.

In a published decision, the Ninth Circuit reversed the judgment of the district court, holding that the continuing violation doctrine rendered Respondent's ADA and Section 504 claims timely -- even though Respondent was not rejected for hire by reason of the color vision standard after March 1, 1996 -- because: (1) he was "exposed" to the color vision standard during the limitations period when he re-submitted a written application for the Group Supervisor position in October, 1996, for the 1996-1998 window period for hiring; and, alternatively, (2) he acted reasonably during the limitations period by pursuing collateral avenues of appeal identified to him and by reapplying for the Group Supervisor position, rather than by filing a discrimination complaint in court or with the EEOC.

The Ninth Circuit applied the continuing violation doctrine to revive Respondent's time-barred March 1, 1996 denial of employment claim based on its identification of the case as one involving a "systemic discrimination policy," and by holding that "repeated efforts" by an applicant to gain employment "extends the accrual of the limitations period in such a case."[1/]

## REASONS FOR GRANTING THE WRIT

### I.

### THE CIRCUMSTANCES BY WHICH THE CONTINUING VIOLATION DOCTRINE MAY EXTEND STATUTORILY-IMPOSED LIMITATION PERIODS IN EMPLOYMENT DISCRIMINATION CASES IS AN IMPORTANT FEDERAL QUESTION UPON WHICH CERTIORARI WAS GRANTED AND IS CURRENTLY PENDING IN THIS COURT

This Court has granted a writ of certiorari to review a decision of the U.S. Court of Appeals for the Ninth Circuit in *Morgan* v. *National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *cert. granted*, 533 U.S. 927, (June 25, 2001)

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1. Until his opposition to petitioner's summary judgment motion, respondent had not alleged that he re-submitted a written application for the Group Supervisor position in the late 1996, nor did he contend that a "systemic policy of discrimination" was at issue in the case.

(No. 00-1614). The question certified for review in *Morgan* is whether the Ninth Circuit correctly held that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

The *Morgan* case concerns a question similar in principle to the first question presented by the instant Petition. In deciding *Morgan*, this Court will review and analyze the same statutes and legal precedents, such as those pertaining to rules of accrual, whether and when a discrete act of discrimination triggers the limitations period, and the application of the continuing violation doctrine to extend limitations periods, as it would if a writ of certiorari were granted in this case. Furthermore, the same public policy considerations are at stake in both cases, such as what level of enforcement of procedural requirements specified by the anti-discrimination statutes will afford predictable results for litigants in employment discrimination cases while effectuating the statutes' remedial purpose of eradicating discrimination.

Thus, the importance of the federal question presented herein and its need for explication has been acknowledged by this Court through its decision to grant a writ of certiorari in *Morgan*. This Court's decision in *Morgan* also has the potential to impact this case because of the similarity of the underlying legal issues presented for review.

## II.

## THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SETTLED SUPREME COURT PRECEDENT CONCERNING THE APPLICATION OF LIMITATION PERIODS AND THE CONTINUING VIOLATION DOCTRINE IN EMPLOYMENT DISCRIMINATION CASES

The Ninth Circuit's decision is in conflict with settled Supreme Court precedent holding that, for purposes of determining the date on which the limitation period accrues in a discrimination case, the relevant date is when the individual is aware of the unlawful acts causing the injury. *Bazemore v. Friday*, 478 U.S. 385 (1986); *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In this case, Respondent alleged that he was discriminated against when CYA rejected him for the position of Group Supervisor because he failed to meet its color vision standard. This discrete event occurred and was communicated to Respondent on a date certain, March 1, 1996, and on no other date. Nonetheless, the Ninth Circuit disagreed with the district court's finding that Respondent's claims for discriminatory denial of employment accrued on that date and that, therefore, his late-filed claims were time-barred. The Ninth Circuit applied the continuing violation doctrine to revive the time-barred claims based on Respondent's submission of a new application for the position while the hiring standard was in effect and during a window period for hiring that extended from 1996 through 1998 and, thus, into the limitations period. The Ninth Circuit reached this conclusion although the hiring standard was not enforced to deny Respondent employment within the limitations period. The application of the continuing violation doctrine by the Ninth Circuit in this manner cannot be

reconciled with U.S. Supreme Court precedent as set forth in *Bazemore,* 478 U.S. 385, *Ricks*, 449 U.S. 250, and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). *See also, Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); and, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

A case that should have involved the straightforward application of settled law to simple facts involving a discrete failure to hire was utilized by the Ninth Circuit to expand the continuing violation doctrine to make actionable time-barred claims where no act of discrimination was alleged to have occurred within the limitations period. This case is an appropriate one for a grant of certiorari because there is a need for a national standard regarding the application of rules of accrual and the continuing violation doctrine in employment discrimination cases.

## A. In Applying The Statute Of Limitations In A Discrimination Case, The Proper Focus Is On The Time That The Alleged Discriminatory Act Occurred, And The Continuing Violation Doctrine Is Inapplicable Where The Plaintiff Fails To Identify Any Discriminatory Act Occurring Within The Limitations Period

It is well-settled that for purposes of determining the date on which the limitation period begins to run in a discrimination case, the relevant date is when the individual is aware of or should be aware of the unlawful acts that caused the injury. *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 258. Once the limitations period begins to run, a plaintiff has, in most cases, 300 days to file a charge of discrimination with the EEOC as a prerequisite to bringing suit under federal anti-discrimination statutes such as Title VII and the ADA, 42 U.S.C. § 2000e-5(e), and, in California, one-year to file suit

under the Rehabilitation Act. CAL. CIV. PROC. CODE § 340(3) (West 1999).

Although nothing precludes the application of the traditional continuing violation doctrine to discrimination cases, that doctrine provides that only successive unlawful acts may reset the date on which the limitations period begins to run. *Zenith Radio v. Hazeltine Research*, 401 U.S. 321, 338-39 (1971). Consistent with the traditional doctrine, this Court rejects its application in discrimination cases where the plaintiff fails to identify one or more discriminatory acts occurring within the limitations period.

In *Ricks*, 449 U.S. 250, this Court first had to "identify precisely the 'unlawful employment practice' of which [Ricks] complains" to determine the timeliness of his EEOC complaint. *Id.* at 257. Ricks alleged that he was denied tenure because of his national origin. *Id.* at 252. Ricks' complaint was held time-barred because he did not file an EEOC complaint within the requisite time period after the tenure decision was made known to him. *Id.* at 261, n.13; *Accord*, *Chardon*, 454 U.S. at 8. In rejecting application of the continuing violation doctrine based on Ricks' continued employment with the college after the denial of tenure, this Court noted that "the only alleged discrimination occurred ... at the time the tenure decision was made and communicated to Ricks." *Ricks*, 449 U.S. at 258. In rejecting Ricks' continuing violation argument, this Court explicitly noted his failure to allege the occurrence of discriminatory acts within the limitations period in his complaint. *Id.* at 504.

In support of its holding in *Ricks*, this Court relied upon an earlier decision, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff was forced to resign as a flight attendant when she married in 1968 under her employer's then-current policy of refusing to allow its female

flight attendants to be married. *Id.* at 554. After her employer's policy changed, Evans sought reinstatement on several occasions but was unsuccessful. *Id.* at 555. After she was rehired as a new employee in 1972, she filed discrimination charges alleging that her employer's seniority system was discriminatory because it failed to credit her for her prior service. *Id.* at 555-556.

This Court noted that, although the resignation-upon-marriage policy had been determined in another case to be violative of Title VII, the *Evans* plaintiff was not a party to that case and she did not initiate any proceedings of her own either within the limitations period following her 1968 forced-resignation or following her employer's act of failing to reinstate her seniority credit upon her rehire. *Id.* at 554-555. Thus, the Court held, these claims were time-barred. *Id.* at 554-555.

In an effort to save her claim, the *Evans* plaintiff alleged that her employer's seniority system gave present effect to a past act of discrimination and that it therefore constituted a continuing violation based on the continuing impact of her employer's resignation-upon-marriage policy on her current seniority status. *Id.* at 578. The Court rejected this theory, stating that the employer:

> ...was entitled to treat that past act as lawful after [Evans] failed to file a [timely] charge of discrimination .... A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately

> considered, it is merely an unfortunate event in history which has no present legal consequences. Id. at 578.

Thus, in *Evans*, this Court focused on the alleged unlawful acts by the employer (i.e. forcing Evans to resign and failing to credit her seniority status upon her rehire), and on whether those acts occurred within the limitations period to determine whether the plaintiff presented a timely claim, rather than focusing on the more ephemeral "present effects" concept. As such, the Court rejected any application of the continuing violation doctrine to save the plaintiff's time-barred claims based on the continuing status of the plaintiff within the seniority system.

Similarly, in a housing discrimination case, this Court dismissed the claims of one of several plaintiffs as untimely where she failed to allege the occurrence of discriminatory acts against her within the limitations period. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-381 (1982). In so doing, the Court reversed the decision of an appellate court that had allowed her to proceed on a continuing violation theory. *Id.* at 380-381. In *Havens*, other plaintiffs' claims were permitted to go forward, but only because they filed their complaints within the 180-day limitation period following the last asserted occurrence of an alleged unlawful practice by the landlord. *Id.* at 380-381. *Havens* thus affirms this Court's view that unless an asserted act of discrimination occurs within the limitations period, the continuing violation doctrine is entirely inapplicable.

This Court has applied the continuing violation doctrine to extend limitations periods under limited circumstances. For example, where an employer paid less salary to black employees than to similarly-situated white employees, this Court held that the suit was timely-filed even

though the salary structure was initiated outside the limitations period because each time a paycheck delivered a lesser salary to a black employee than to a white employee, a discriminatory act occurred. *Bazemore*, 478 U.S. at 395-396.

Likewise, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912, n.5 (1989), this Court noted that a facially discriminatory policy can be challenged even years after its inception because it "discriminates each time it is applied," in recognition that it is the employer's application of that policy that constitutes the unlawful act.[2/]

The circumstances that called for the application of the continuing violation doctrine in *Bazemore* and *Lorance* cannot be reconciled with those present here. This case does not involve ongoing discrimination but, rather, it involves a discrete decision on March 1, 1996, to deny the plaintiff employment based on his inability to meet a minimum qualification for the job. Thus, the *Evans, Ricks* and *Havens Realty* line of cases control. Respondent's awareness of his rejection for hire because of his failure to meet CYA's hiring standard triggered his duty to assert his rights under the federal anti-discrimination laws. Thus, when Respondent failed to timely file his claims, CYA's March 1, 1996 hiring decision became the legal equivalent of a discriminatory act which occurred before the ADA or Rehabilitation Act were passed.

The Ninth Circuit's decision essentially creates an open-ended statute of limitations for applicants who fail to meet

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2. Congress narrowed the ruling in *Lorance* to allow challenges to facially neutral seniority systems at any time after their adoption, but did not otherwise alter the court's rulings that the statute of limitations runs from the date of an occurrence of an unlawful act.

stated minimum hiring standards. This Court has explained the rationale behind statutes of limitations as follows:

> Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' [citation], represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' [Citation.] These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. [Citations.] *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

The resulting effect of the decision below is that applicants who have been denied employment in the past may revive time-barred claims merely by re-submitting a written application for the same position on a future date, so long as the hiring standard is still in effect. Further, it allows the plaintiff to dictate when the statute accrues and leaves employers potentially vulnerable to suit years after employment decisions are made. This is contrary to the policy rationale behind statutes of limitation, which is to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.

## III.

## THE NINTH CIRCUIT HAS CREATED NEW GROUNDS FOR TOLLING THE STATUTORY LIMITATIONS PERIOD

In an alternative holding, the court of appeals stated that, even if it applied a strict notice requirement to the facts, it would find that the continuing violation doctrine saved Respondent's claims because "we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas v. California Department of Youth Authority*, 271 F.3d at 824, n.13, *citing*, *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); App. A-20 through App. A-21. The "avenue of appeal" referred to by the court was CYA's internal discrimination unit and the California State Personnel Board. It is undisputed that Respondent appealed to these entities in an effort to obtain a direct reversal of CYA's March 1, 1996 hiring decision.

The Ninth Circuit's alternative holding is essentially the impermissible "tolling" of the limitations period during the pursuit of administrative appeals which has been expressly disapproved of by this Court. *Ricks*, 449 U.S. at 261. In *Ricks*, the plaintiff argued that his pursuit of a grievance regarding the employment decision at issue tolled the limitations period such that his claims did not actually accrue until he was notified of the unfavorable results of the grievance. This Court disagreed, stating:

> [t]he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made. . . . . the pendency of a

> grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. *Id.* at 261, *citing*, *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

Thus, the period within which Ricks should have filed his claims having passed, this Court held that his 42 U.S.C. § 1981 and Title VII employment discrimination claims were time-barred. *Id.* at 262. Apparent in the Court's decision was its recognition of the deference to be paid federally enacted limitation periods and to the concept that limitation periods normally commence when the employer's decision is made. *Id.* at 256-257, 259; 42 U.S.C. § 2000e-5(e).

In this case, the court of appeals utterly failed to consider *Ricks*. Its alternate holding, that the continuing violation doctrine revived Respondent's late claims under the "reasonableness" test espoused in *Galloway*, was no more than an exercise in specious reasoning.[3/] Under the facts, the holding

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3. *Galloway* concerned a pattern of harassing conduct over time, where the time-barred conduct was recognized as actionable only in light of the conduct occurring within the limitations period. *Galloway*, 78 F.3d at 1167-1168. The "reasonableness" factor discussed in *Galloway* concerns the question of whether and when, under the circumstances, it is reasonable to expect a plaintiff to recognize that he is a victim of actionable injury. *Id.* at 1166-1168. Here, Respondent did not allege a pattern of harassing conduct over time. To the contrary, he alleged a discrete hiring decision communicated to him on a date certain. The fact that Respondent re-applied for the position has no analytical counterpart in *Galloway* which would require a different result from *Ricks*.

in *Ricks* controls and, if it had been followed by the Ninth Circuit, should have resulted in a finding that Respondent's pursuit of collateral methods of review of Petitioner's decision to deny him employment did not extend the limitations period. The Ninth Circuit's holding subverts *Ricks* and re-opens the door for the extension of limitation periods based on the pendency of administrative appeals, a limitations-avoiding tactic already disapproved-of by this Court.

## CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Dated: April 12, 2002

Respectfully submitted,

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